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NO. 82-5090

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

WILLIAM ANTHONY BROOKS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

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SUPREME COURT, U.S.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

Did the trial court err in refusing to grant the motion for change of venue?

2.

Was the closing argument of the prosecuting attorney improper?

3.

Were the statutory aggravating circumstances which existed in the petitioner's case properly instructed by the trial court?

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PART ONE

STATEMENT OF THE CASE

Petitioner, William Anthony Brooks, was convicted in the Superior Court of Muscogee County, Georgia, for the kidnapping, rape, armed robbery and murder of Carol Jeannine Galloway. The jury found two statutory aggravating circumstances: (1) the murder was committed while the offender was engaged in the commission of rape and armed robbery and (2) the murder was outrageously or wantonly vile, horrible, or inhuman.

Brooks' convictions and sentences[1/] were affirmed by the Supreme Court of Georgia in Brooks v. State, 244 Ga. 574, 261 S.E.2d 379 (1979). The evidence, set forth in detail in the appellate decision, showed that Brooks accosted Miss Galloway, age 23, at gunpoint in the front yard of her parents' residence and, at gunpoint, ordered her to get into her car and drive away.

> . . . [Brooks] ordered Miss Galloway to park the car and walk into the nearby woods where he first robbed Miss Galloway of at least $20.00 and then raped her. Following appellant's completion of the sex act, Miss Galloway reiterated her continuing plea that appellant permit her to leave. Appellant's sole response was to ask

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1/ Brooks was sentenced to death for murder, to life for kidnapping and rape, and to twenty years for armed robbery.

> Miss Galloway if she had ever experienced sex before, and when told by Miss Galloway that she had not, to taunt her with his disbelief. At this point, Miss Galloway began to scream. When she did not heed his warning to stop, the appellant, to impress upon Miss Galloway the seriousness of his warning, aimed his gun at her face and pulled the handle back into a cocked position. When Miss Galloway continued to scream, the appellant fired one shot, his bullet piercing Miss Galloway's lower neck and causing a slow but steady loss of blood which resulted (but only after the passage of a full two hours) in her death.

Id. at 575. Brooks fled, and was not captured for almost one month. After arrest, he confessed to the crimes and his confessions were introduced into evidence. Id.

Brooks petitioned this Court for a writ of certiorari; on May 27, 1980, the Court granted the petition, vacated that portion of the judgment affirming the death penalty, and remanded to the Supreme Court of Georgia for further consideration in light of Godfrey v. Georgia, 446 U.S. 420 (1980). On remand, that court reexamined the imposition of the death penalty and reaffirmed Brooks' sentence of death. Brooks v. State, 246 Ga. 262, 271 S.E.2d 172 (1980).

Following the reaffirmance of his death penalty, Brooks filed a second petition for a writ of certiorari which was denied.

Thereafter, he filed a state habeas corpus petition in the Superior Court of Butts County, Georgia, upon which relief was denied. The Supreme Court of Georgia denied the certificate of probable cause to appeal and this petition ensued.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT THE MOTION FOR CHANGE OF VENUE.

The first of three reasons proffered by petitioner in seeking the writ is that the trial court committed error in refusing to grant the motion for change of venue. This issue was presented on direct appeal and again to the state habeas court. In the brief filed in this Court, petitioner does nothing more than refer to numerous newspaper articles dealing with the murder. Based upon these newspaper articles, petitioner contends that the "due process standard" in Irvin v. Dowd, 366 U.S. 717 (1961) has been violated. In effect, petitioner would have this Court abandon, for purposes of deciding this case, its established test for determining the impartiality of a juror and apply instead an exclusionary rule; that is, any juror who has read newspaper accounts or heard television and radio accounts of the crime should be excluded from jury service even though that juror states that he can determine guilt or innocence based solely upon the evidence adduced at trial. Almost 500 pages of voir dire transcript plainly show that the jurors finally selected were neither biased nor partial. Indeed, the process in selecting the jurors was painstaking.

As noted by the Supreme Court of Georgia on direct appeal, the motion for change of venue was supported by the introduction into evidence of 26 articles published by two Columbus newspapers between July 15, 1977, the date of commission of the crime, and August 23, 1977, twelve days after Brooks had been arrested.

"The record contains no article published during the two and two-thirds months immediately preceding [Brooks'] trial on Nov. 15, 1977; however, the transcript reflects that one article was published on Nov. 14, 1977, the very eve of the trial, wherein it was restated that [Brooks'] had confessed to the indicted crimes. . . ." Brooks v. State, 244 Ga. 574, 576, 261 S.E.2d 379 (1979).

In its lengthy treatment of this issue on direct appeal, the Supreme Court of Georgia recognized that in order to establish a denial of the Sixth Amendment right to an impartial jury, one must establish (1) actual juror partiality or (2) circumstances inherently prejudicial to that right. 244 Ga. at 577; Murphy v. Florida, 421 U.S. 794, 803 (1974).

First addressing the issue of actual juror partiality, and relying on Irvin v. Dowd, supra, the Supreme Court found that

> . . . all twelve selected jurors testified on voir dire that they were without a fixed opinion as to [Brooks'] guilt or innocence. [Brooks] protests, however, that this formal declaration of impartiality was impeached, in the case of one juror, by her admissions that she held an "undecided opinion" as to [Brooks'] guilt based upon newspaper accounts of the Columbus police department's certainty that [Brooks] was Miss Galloway's assailant. This same juror, however, testified in explanation of the above that she understood the police made mistakes and that

her "undecided" opinion would not preclude her from deciding [Brooks'] guilt or innocence solely on the evidence presented at trial.

Id. at 577.

As petitioner does before this Court, in the Supreme Court of Georgia he emphasized the "sheer number of newspaper publications (26), [and] the publication of parts of his confession. . . ." Id. at 578. As the Supreme Court of Georgia found, the pattern of pretrial publicity in the present case is very much like that in Stroble v. California, 343 U.S. 181 (1951), in which the allegedly inflammatory newspaper accounts appeared some six weeks before the beginning of the trial. As in Stroble, in the present case "there is no affirmative showing that community prejudice ever existed or in any way affected the deliberation of the jury." Therefore, among the factors to be considered are the absence of any evidence of actual juror prejudice, the remoteness in time between publicity and trial, and the eventual admission of the confession into evidence. Id. at 579.

Finally, the Supreme Court of Georgia considered Rideau v. Louisiana, 373 U.S. 723 (1963), cited by petitioner. In Rideau, a confession was televised three times approximately two months before the trial and the confession was never admitted into evidence. It was found that this did demonstrate inherent prejudice. However, the Rideau court "made clear the continued vitality of Stroble, and the limited holding of Rideau." Id. at 580.

Thus, in order to invoke the Sixth Amendment's presumption of juror partiality on the basis of inherently prejudicial pretrial publicity, Brooks must show "a trial atmosphere utterly corrupted by press coverage." Murphy v. Florida, 421 U.S. at 798.

In its order, the Superior Court of Butts County, Georgia, sitting as the state habeas court, concluded that because the State Supreme Court had ruled on this issue no further review was permissible.

It is evident that although petitioner is dissatisfied with the result of his trial, he is unable to establish any federal constitutional violation by the trial court's refusal to grant his motion for change of venue. On the contrary, the record clearly demonstrates that the jury ultimately selected was fair and impartial. The first ground presents no basis for granting the writ.

II. THE CLOSING ARGUMENT OF THE PROSECUTING ATTORNEY WAS PROPER.

In his second enumeration, petitioner contends that the "closing argument given by the prosecutor at the sentencing phase of petitioner's trial was a catalogue of virtually every improper, irrelevant, inflammatory and prejudicial argument which can be made in a criminal trial." Brief at 12.

The state habeas court considered at the outset that the state supreme court had conducted its sentence review and determined that the death penalty was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Habeas order at 18. Reviewing the particular argument, the state court concluded that the prosecutor may argue for a death sentence and offer plausible reasons for his position, that he may urge severe punishment, and that protection of the community is one consideration a jury is entitled to entertain in determining an appropriate sentence. "The Court has examined the prosecutor's closing argument (T. 859-873) and found nothing improper." State habeas order at 19. The closing argument of the prosecutor was not improper and he did not exceed permissible bounds in urging the appropriate penalty to be imposed by the jury. Furthermore, allegations of improper jury argument and misconduct by the prosecution do not present a claim of constitutional magnitude cognizable in federal court unless such arguments and conduct, taken as a whole and in the context of the entire trial, are so prejudicial as to render the state court trial fundamentally unfair within the meaning of the due process clause of the Fourteenth Amendment. Donnelly v. DeChristoforo, 416 U.S. 637 (1974); Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980). A dintinction must be made between conduct of the prosecutor which is improper or unwarranted but is not a denial of due process. See Easter v. Estelle, supra at 760.

In summary, it is not disputed that the prosecutor eloquently urged for the imposition of the death penalty; as the representative of the people, having determined the facts of this case warranted seeking the death penalty it was not only his privilege but his duty, within the bounds of the law, to persuade the jury that the evidence before them supported imposition of the death penalty. However, to characterize this argument as improper, much less to label misconduct, is perhaps best attributed to zealous efforts to evade the death penalty. Such labels certainly do not have their genesis in the evidence before this Court.

III. THE STATUTORY AGGRAVATING CIRCUMSTANCES WHICH EXISTED IN PETITIONER'S CASE WERE PROPERLY INSTRUCTED BY THE TRIAL COURT.

In his final enumeration, Petitioner complains of the lack of guidance in the trial court's instructions to the jury. This issue has previously been presented to the Court in Brooks v. Georgia, Case No. 80-5850, in which this Court denied the petition for a writ of certiorari. However, for the Court's convenience in reviewing the issue, it will be addressed briefly herein.

A review of the trial court's sentencing instructions shows a thorough and accurate charge to the jury. The trial court instructed:

> . . . Your responsibility at this stage of the trial is to determine first whether any mitigating or aggravating circumstances existed at the time the murder was committed, which would authorize you to recommend the death penalty for the defendant.
>
> Before you would be authorized to recommend the death penalty, you must first determine whether, at the time the crime was committed, the following Statutory, aggravating circumstances existed beyond a reasonable doubt. . . .

(T. 885). After instructing the jury on the pertinent statutory aggravating circumstances, the trial court continued:

Now, ladies and gentlemen, if you find that either of these aggravating circumstances existed beyond a reasonable doubt, and if you recommend the death penalty, then the Court is required by law to sentence the defendant to death.

On the other hand, you can see fit, ladies and gentlemen, whether aggravating circumstances existed or not, to recommend mercy for the defendant if this should be your finding, then in that event the Court is required by law to sentence the defendant to life imprisonment.

In arriving at your determination, you are authorized to consider all the evidence received throughout this trial, presented by both the State and the defendant. You are authorized to include in your consideration the facts and the circumstances, if any, in mitigation and aggravation.

Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame.

> Aggravating circumstances are those, ladies and gentlemen, which increase the guilt or the enormity of the offense, or add to its injurious consequences.
>
> * * *
>
> Now, ladies and gentlemen, even though you find Statutory, aggravating circumstances exist, you may refuse to recommend the death penalty, in which event the defendant would receive a sentence of life imprisonment.

(T. 886-88). The jury was plainly instructed that it could recommend a sentence of death only if it found statutory aggravating circumstances. The jury was further instructed that even if it found such circumstances it need not impose the death penalty and it could in its discretion recommend mercy. Finally, the jury was told that unless aggravating circumstances existed, a life sentence only could be imposed. One cannot imagine a more explicit and correct instruction to the jury on its role under the Georgia death penalty statute.

Petitioner also contends that Ga. Code Ann. § 27-2534.1(b)(7) was inadequately charged to the jury. The entire circumstances surrounding the applicability of Ga. Code Ann. § 27-2534.1(b)(7) were considered on remand by the Supreme Court of Georgia, which found the following:

> Having reconsidered the facts of the present case as directed, this court now reaffirms on two, independent grounds, the appellant's sentence of

death for the murder of Carol Jeannine Galloway.

First, in the present case, the jury's verdict for the death sentence was predicated, not only on Code Ann. § 27-2534.1(b)(7), but also on Code Ann. § 27-2534.1(b)(2) (The jury found, beyond a reasonable doubt, that the murder was committed during the appellant's commission of a rape and an armed robbery).

"Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon." Gates v. State, 244 Ga. 587, 599 (261 SE2d 349)(1979).

Therefore, we reaffirm the appellant's sentence of death on the ground that the jury's finding of Code Ann. § 27-2534.1 (b)(2) was supported by legally sufficient evidence.

Moreover, in the present case, the jury found that the appellant's murder of Ms. Galloway reflected, beyond a reasonable

doubt, "depravity of mind" under Code Ann. § 27-2534.1(b)(7) and "when only facts occurring prior to death are relied upon . . ., the fact that the victim was tortured will . . . support a finding of depravity of mind . . ." Hance v. State, 245 Ga. 856 (268 SE2d 339)(1980).

Torture occurs when the victim is subjected to serious physical abuse before death. Godfrey v. Georgia, supra; Hance v. State, supra.

In the present case, the victim died, not instantaneously, but a full two hours after being shot in the neck and abandoned by the appellant, death resulting from a slow but steady loss of blood.

Also, it is beyond question that the appellant seriously and sexually abused Ms. Galloway. See Hance v. State, supra (physical abuse includes sexual abuse for purposes of proving torture under Code Ann. § 27-2534.1(b)(7).

Finally, following his rape of Ms. Galloway, the appellant taunted his victim with her lost virginity and

made her the target of his gun, said acts combining to cause her to scream uncontrollably. See Hance v. State, supra. (physical abuse includes psychological abuse resulting in mental anguish to the victim in anticipation of physical harm).

Accordingly, this court reaffirms the appellant's sentence of death on the ground that, unlike the jury's finding of Code Ann. § 27-2534.1(b)(7) in Godfrey v. Georgia, supra, the jury's finding of said statutory aggravating circumstance in the present case was supported by legally sufficient evidence.

246 Ga. at 263-64.

Thus, it is plain that the jury was properly instructed and that the instruction as well as all circumstances surrounding imposition of the death penalty were properly and fully considered by the Supreme Court of Georgia.

CONCLUSION

No sufficient reason having been presented, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daryl A. Robinson, Attorney of Record for the Respondent and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for Respondent in Opposition upon Petitioner's attorney by depositing a copy of this Brief in the United States mail, with proper address and adequate postage to:

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This 1st day of September, 1982.

Daryl A. Robinson
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